Winerich Sdn Bhd v Alpha Atlas Management Sdn Bhd

HIGH COURT (MELAKA) — COMPANIES WINDING UP NO MT1-28-48 OF 2002
LOW HOP BING J
7 AUGUST 2003

Companies and Corporations — *Winding up — Opposition to winding up — Petition — Affidavit verifying dated before petition — Whether affidavit invalid — Whether petition void — Whether such defect curable — Companies (Winding Up) Rules 1972, r 26, 193, 194(1) and Companies Act 1965 s 221(2)*

The petitioner filed this petition for the winding up of the respondent company. The petition itself and the affidavit verifying the petition ('the said affidavit') had been served on the respondent. However, the said affidavit had, in contravention of r 26 of the Companies (Winding Up) Rules 1972 ('the Rules'), been affirmed four days prior to the filing of the petition. The petitioner thus sought an order to extend the time for filing the said affidavit, so as to allow the petitioner to file the said affidavit within four days of the order. The petitioner submitted that r 26 was merely directory and ought to be read together with rr 93 and 194 of the Rules. The respondent had not been misled or prejudiced. The respondent contended, relying on *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 (CA), that since r 26 has not been complied with, the petition was void. The petitioner had failed to give good and cogent reasons for the court to exercise its discretion to grant an extension.

Held, allowing the petitioner's application:

(1) The submissions show a common ground, that the said affidavit had failed to comply with r 26. The question, whether non-compliance with r 26 rendered the petition void, was to be determined by a true construction of rr 26, 193, 194(1) of the Rules and s 221(2) of the Companies Act 1965 ('the Act') (see p 551A–C).

(2) While r 26 provides for a time-limit for the affirmation of an affidavit verifying a petition, ie four days after the petition is presented, such a time limit is to be read in the context of r 193 under which the court is given the power or discretion to extend or abridge the time appointed by the Rules. The strictness of r 26 is further mitigated by r 194(1) which disallows proceedings under the Act or the Rules to be invalidated by any formal defect or irregularity unless substantial injustice is thereby caused which cannot be remedied by an order of the court (see p 551D–F); *Sam Hin Timber Trading Company v Perusahaan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269; *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 and *The People's Insurance Company (M) Sdn Bhd v Juru Urusetia Sdn Bhd* [1997] MLJU 48; [1997] 3 CLJ

Supp 388 followed, *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 distinguished, and *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 not followed.

(3) Section 221(2)(b) and (f) of the Act contain sufficiently broad provisions for the exercise of the powers of the court, when a petition comes on for hearing or in any application by the petitioner at any stage of the proceedings, untrammelled by any limit except as the court thinks fit, including curing irregularities which cause no injustice to the respondent. This power or discretion is to be exercised judicially, according to the particular facts and circumstances prevailing in each individual case (see p 551D–552A).

Semble: The petition and the said affidavit are almost always prepared together and the said affidavit is invariably affirmed before both documents are filed simultaneously. The petition is then entered by the registry staff and eventually signed and sealed by the registrar, sometimes a few days later, in view of the volume of work handled by the registry. As a result, the said affidavit would bear a date prior to the date of the petition. It is for this reason that the Act and the rules contain provisions for the extension of time in order to avoid any miscarriage of justice. It is essential that a court is empowered to grant extend time to remove any exceptional hardship to. The submission of the respondent, if upheld, would result in untold difficulties to legal practitioners.

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen ini bagi penggulungan syarikat respondent. Petisyen tersebut dan afidavit mengesahkan petisyen ('afidavit tersebut') telah diserahkan ke atas responden. Walau bagaimanapun afidavit tersebut telah, bercanggah dengan k 26 Kaedah-Kaedah Syarikat (Penggulungan) 1972 ('Kaedah-Kaedah tersebut'), diikrarkan empat hari sebelum tarikh pemfailan petisyen tersebut. Pempetisyen memohon suatu perintah lanjutan masa bagi membolehkannya memfailkan afidavit tersebut dalam tempoh empat hari dari tarikh perintah. Pempetisyen berhujah k 26 semata-mata panduan sahaja dan perlu dibaca bersama-sama dengan kk 93 dan 194 Kaedah-Kaedah tersebut. Responden tidak dikelirukan atau diprejudiskan. Respondent mendakwa, mengikut *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 MR, bahawa memandangkan yang k 26 tidak dipatuhi, petisyen adalah terbatal. Pempetisyen telah gagal memberi alasan yang baik dan kukuh bagi membolehkan mahkamah menjalankan budi bicaranya memberikan suatu lanjutan masa.

Diputuskan, membenarkan permohonan pempetisyen:

(1) Hujah-hujah menunjukkan suatu pendirian yang sama, bahawa afidavit tersebut gagal mematuhi k 26. Persoalannya, samada ketidakpatuhan dengan k 26 menjadikan petisyen terbatal, harus ibertimbangkan dengan suatu pembacaan benar kk 26, 193, 194(1) Kaedah-Kaedah tersebut dan s 221(2) Akta Syarikat ('Akta tersebut') (lihat ms 551A–C).

(2) Walaupun k 26 memperuntukkan suatu had masa bagi mengikrarakan suatu afidavit mengesahkan sesuatu petisyen, iaitu empat hari selepas petisyen tersebut diserahkan, had masa tersebut harus dibaca dalam konteks k 193 yang memberikan mahkamah kuasa atau budibicara melanjutkan masa yang diberikan dibawah Kaedah-kaedah tersebut. Ketegasan k 26 juga diringankan oleh k 194(1) yang tidak membenarkan prosiding dibawah Akta tersebut atau Kaedah-Kaedah tersebut dibatalkan semata-mata atas kecacatan atau ketidakrataan formal melainkan kewujudan ketidakadilan yang tidak dapat dipulihkan dengan sebarang perintah mahkamah (lihat ms 551D–F); *Sam Hin Timber Trading Company v Perusahaan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269; *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 dan *The People's Insurance Company (M) Sdn Bhd v Juru Urusetia Sdn Bhd* [1997] MLJU 48; [1997] 3 CLJ Supp 388 diikut, *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 dibeza, and *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 tidak diikut.

(3) Seksyen 221(2)(b) dan (f) Akta tersebut mengandungi peruntukan yang cukup luas bagi amalan kuasa mahkamah, semasa suatu petisyen dihadapkan bagi perbicaraan atau dalam sebarang permohonan oleh pempetisyen pada mana-mana peringkat prosiding, tidak dihadkan kepada apa-apa halangan kecuali dianggap sesuai oleh mahkamah, termasuk memulihkan sebarang ketidakrataan yang tidak menyebabkan ketidakadilan kepada responden. Kuasa atau budi bicara ini hendaklan dijalankan secara saksama, mengikut fakta dan keadaan setiap kes (lihat ms 551D–552A).

Semble: Petisyen dan afidavit tersebut disediakan bersama dan afidavit tersebut selalunya diikrarkan sebelum kedua-dua dokumen difailkan serentak. Petisyen kemudiannya didaftarkan oleh kakitangan pejabar pendaftaran dan akhirnya ditandatangan dan dimeteraikan oleh pendaftar, kekadang selepas beberapa hari, memandangkan banyaknya tugasan yang dkendalikan oleh pejabat pendaftaran. Akibatnya, afidavit tersebut akan bertarikh beberapa hari sebelum tarikh petisyen. Memandangkan sedemikian, Akta tersebut dan Kaedah-kaedah tersebut mengandungi peruntukan bagi lanjutan masa supaya suatu kesilapan keadilan dapat dielakkan. Adalah penting mahkamah diberi kuasa melanjutkan masa supaya mengalihkan kesukaran kepada pengamal guaman. Hujah responden, sekiranya diterima, akan mengakibatkan kesengsaraan kepada pengamal guaman.]

Notes

Cases on opposition to winding up, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1150.

Cases referred to

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (distd)
People's Insurance Company (M) Sdn Bhd, The v Juru Urusetia Sdn Bhd [1997] MLJU 48; [1997] 3 CLJ Supp 388 (folld)
Sam Hin Timber Trading Company v Perusahaan Sri Duyong Sdn Bhd [1983] 2 CLJ 269 (folld)
Sari Atlantic Sdn Bhd v Aik Kim Enterprise [1988] 1 MLJ 201 (folld)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (refd)
YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd [1996] 2 MLJ 482 (not folld)

Legislation referred to

Companies Act 1965 s 221(2)(b), (f)
Companies (Winding Up) Rules 1972 rr 26, 193, 194(1)

Application

This is an application in encl (16) by way of summons in chambers filed by the petitioner for an order to extend the time to file the affidavit verifying the petition filed on 24 December 2002, and to allow the petitioner to file the said affidavit within four days of this order with costs in the cause. The said affidavit was affirmed on 18 December 2002 which was four days prior to the filing of the petition.

Both the petition and the said affidavit have been served on the respondent.

All references herein to the sections and the rules are references to those sections in the Companies Act 1965 ('the Act') and the Companies (Winding Up) Rules 1972 ('the Rules').

Counsel's submissions and court's decision

Mr Kesavan P Krishnan, learned counsel for the petitioner, submitted that r 26 is merely directory and not mandatory and must be read with rr 193 and 194. It was also canvassed that the respondent was not misled or prejudiced hereby.

Mr Jagjit Singh, learned counsel for the respondent, contended that the petitioner has failed to provide good and cogent reasons for the court to exercise its discretion to grant the extension, and that since r26 has not been complied with, the petition is void, relying on *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd* [1996] 2 MLJ 482.

A In my judgment, it is pertinent to observe that the above submissions show a common ground, that is, the said affidavit has failed to comply with r 26, the relevant position of which reads as follows:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit verifying thereto. The Affidavit in Form 7 shall be made by the
B petitioner, and shall be sworn and filed within four days after the petition is presented, "

The question is whether non-compliance with r 26 renders the petition void as contended for the respondent. In my view, this question is to be determined by a true construction of rr 26, 193, 194(1) and s 221(2) of the Rules.

C For the sake of completeness, rr 193 and 194(1) of the Rules merit reproduction as follows :

> 193 The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
>
> D 194(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

While r 26 no doubt provides for a time-limit for the affirmation of an affidavit in Form 7 verifying a petition, ie four days after the petition is
E presented, such a time-limit is to be read in the context of r 193 under which the court is given the power or discretion in any cause in which it shall see fit to extend or abridge the time appointed by these Rules.

The strictness of r 26 is further mitigated by r 194(1) which disallows proceedings under the Act or the Rules to be invalidated by any formal
F defect or irregularity unless there is substantial injustice caused thereby which cannot be remedied by any order of the court.

Further, s 221(2)(b) and (f) of the Act where relevant contain sufficiently broad provisions in the following words:

> 221(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person
G who has given notice that he intends to appear on the hearing of the petition —
>
> (a) ... ;
>
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of
H the Court;
>
> (c) ... ;
>
> (d) ... ;
>
> (e) ... ;
>
> (f) give such directions as to the proceedings as the Court thinks fit.

I These broad provisions include the exercise of the powers of the court when the petition comes on for hearing or in any application made by the petitioner at any stage of the proceedings, untrammelled by any limit but as

the court thinks fit, including curing irregularities without causing any injustice to the respondent. A

The power or discretion is to be exercised judicially according to the particular facts and circumstances prevailing in each individual case.

An analysis of several decisions of our court dealing with similar applications arising from similar facts and circumstances would undoubtedly be illuminating. B

In *Sam Hin Timber Trading Company v Perusahaan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269 (HC), a petition for the winding up of Sri Duyong was presented on 24 March 1983, but the affidavit verifying the petition was affirmed on 8 March 1983, some 16 days prior thereto, occasioning a non-compliance with r26. An application filed by the petitioner for extension of time for filing such affidavit, ie to reaffirm the same affidavit, was opposed by Sri Duyong. Peh Swee Chin J (later FCJ) held that the court has the power to extend the time asked for under rr 193 and 194 of the Rules and that the premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time and compensating the victim with costs, because Sri Duyong could not have been misled in any way, neither was there any real prejudice caused to Sri Duyong. A petition was presented to the court to wind up the respondent company in *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201, but the affidavit verifying the petition was affirmed about four days before the presentation of the petition itself, which was a clear failure to comply with r 26 of the Rules. At the hearing of the petition, the respondent company contended that the non- compliance was a fatal defect and that the petition must be rejected as the court had no power to cure such a defect. Lim Beng Choon J (as he then was) held that the non-compliance did not render the petition a nullity and was curable by the court and that s 221(2)(b) and (f) of the Act allowed the court to cure a technical error which did no injustice to the respondent. The learned Judge allowed an extension of time to the petitioner to re swear an affidavit to verify the facts and the filing and swearing of such affidavit before the hearing of the petition. C D E F

In *The People's Insurance Company (M) Sdn Bhd v Juru Urusetia Sdn Bhd* [1997] MLJU 48; [1997] 3 CLJ Supp 388, the petitioner presented a winding up petition on 22 October 1996. On that same day, it filed the affidavit which was sworn on 18 October 1996, ie before the presentation of the petition, in breach of r 26 of the Rules. On 3 January 1997, the respondent informed the petitioner of this breach. On 17 January 1997, the petitioner filed an application for extension of time to file a verifying affidavit. Abdul Aziz Mohamad J (as he then was) held that the affidavit which did not comply with r 26 of the Rules was at worst a nullity, but the petition itself was not void, and that a petition may be presented without a verifying affidavit and it can remain without one for four days, but becomes defective if the verifying affidavit was not filed in time, ie within four days of the presentation of the petition. The learned judge also held that the power to extend time is given by r 193 of the Rules and granted leave to the petitioner to file a freshly sworn affidavit, with costs in the cause. G H I

A It is instructive to observe that the facts before all the three learned judges bore striking similarities in relation to those in this application before me.

At this juncture, it is useful to observe a point of practical convenience, in that the petition and the said affidavit are almost always prepared
B simultaneously and that the said affidavit is invariably affirmed before these two documents are filed, also simultaneously as a result of which the said affidavit would bear a date prior to the date of the petition which is subsequently entered by the registry staff and eventually signed and sealed by the registrar, sometimes a few days later in view of the volume of work handled by the registry. Hence, the Act and the rules contain a provision for
C the extension of time in order to avoid any miscarriage of justice.

It is essential that the court is empowered to grant an extension of time to remove any exceptional hardship to legal practitioners. The submission advanced for the respondent, if upheld, would result in untold difficulties to members of the Bar.

D I pause here to refer to *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 which was referred to by all the aforesaid three learned judges who declined to follow it. In *Chin Yoon Timber*, the court refused an extension of time because, inter alia, the learned judge there appeared to have taken a dim view of the petitioner filing a second affidavit without applying for leave before hand, during an adjournment expressly granted to
E enable parties to look up authorities to deal with the objection of premature swearing of a similar affidavit, and making an oral application in the middle of re-arguments, for extension of time in order to validate apparently the second affidavit, without any explanation. What the petitioners had done there in filing a second affidavit in advance of re-arguments and the court's
F judgment would appear to be an act of considerable discourtesy to his Lordship there, and an oral application not therefore supported by an affidavit setting out the reasons for the application, would not be appropriate in the circumstances of that case: see para 7 of the judgment of Peh Swee Chin J (as he then was) in *Sam Hin Timber* at p 270.

G *YPJE Consultancy Services* relied upon by the respondent herein, does not seem to be supportive of the contention for the respondent. The Court of Appeal in *YPJE Consultancy Services* at p 61 after referring to *Chin Yoon Timber* and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32, observed :

> H What is clear from these authorities is that the affidavit must be made in some cause or matter which is actually pending in the court. Consequently, the affidavit which was sworn before the presentation of the petition would cause the petition to be void.

The Court of Appeal's observation was referred to by Abdul Aziz Mohamad J (as he then was) in *The People's Insurance*, who at p 390 of CLJ said :

> I ... It does not seem to me that the Court of Appeal were there making a considered ruling that where an affidavit verifying a winding-up petition is sworn before the presentation of the petition, the petition is void. I think it was

a statement of what they perceived to be the consequence of the defect as decided in the two cases that they were referring to. They had no need to arrive at a decision on that issue because they went on to find in the case before them that there was no evidence that the affidavit had been sworn before the petition was presented and therefore the two cases cited were not applicable to the factual situation before them.

I am in entire agreement with the aforesaid statement, and follow the principles enunciated above by Peh Swee Chin J (later FCJ); Lim Beng Choon J and Abdul Aziz Mohamad J (now JCA).

In the circumstances, I allow the petitioner's application in encl (16) and make an order in terms thereof.

Petitioner's application allowed.

Reported by Sivapragasam Kumaran